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7 **UNITED STATES DISTRICT COURT**
8 **EASTERN DISTRICT OF CALIFORNIA**
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10 TYLER JAMES SUONG,

11 Petitioner,

12 v.

13 CRAIG KOENIG,

14 Respondent.

Case No. 1:20-cv-00347-AWI-EPG-HC

ORDER ADOPTING FINDINGS AND
RECOMMENDATION, DISMISSING
PETITION FOR WRIT OF HABEAS
CORPUS, DIRECTING CLERK OF COURT
TO CLOSE CASE, AND DECLINING TO
ISSUE CERTIFICATE OF
APPEALABILITY

(ECF No. 6)

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17 Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus
18 pursuant to 28 U.S.C. § 2254. On April 1, 2020, the Magistrate Judge issued Findings and
19 Recommendation that recommended dismissing the petition as an unauthorized successive
20 petition. (ECF No. 6). On April 20, 2020, Petitioner filed timely objections. (ECF No. 8).

21 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this Court has conducted
22 a de novo review of the case. Having carefully reviewed the entire file, including Petitioner's
23 objections, the Court concludes that the Findings and Recommendation is supported by the
24 record and proper analysis.

25 In his objections, Petitioner contends that his petition is timely and ripe for relief because
26 he is attacking a recent state court decision that dismissed a petition for writ of coram nobis.
27 (ECF No. 8 at 2).¹ The Court recognizes that “[h]abeas petitions that are filed second-in-time are

28 ¹ Page numbers refer to the ECF page numbers stamped at the top of the page.

1 not necessarily second or successive.” Clayton v. Biter, 868 F.3d 840, 843 (9th Cir. 2017). For
 2 example, “a habeas petition that challenges a new or intervening judgment is not a second or
 3 successive petition even where the intervening judgment left in place an earlier challenged
 4 conviction and sentence.” Id. at 843–44 (citing Wentzell v. Neven, 674 F.3d 1124 (9th Cir.
 5 2012)). However, the Court is unaware of any authority holding that a state court’s order
 6 dismissing a petition for writ of coram nobis constitutes a new or intervening judgment from
 7 which an otherwise successive habeas petition may be filed. The instant federal petition is not
 8 challenging the state court decision that dismissed Petitioner’s petition for writ of coram nobis
 9 but rather Petitioner’s underlying criminal judgment pursuant to which he is in custody. See
 10 Magwood v. Patterson, 561 U.S. 320, 332–33 (2010) (“A § 2254 petitioner ‘seeks *invalidation*
 11 (in whole or in part) of the judgment authorizing the prisoner’s confinement,’ . . . Thus, both §
 12 2254(b)’s text and the relief it provides indicate that the phrase ‘second or successive’ must be
 13 interpreted with respect to the judgment challenged.” (internal citation omitted)).

14 Petitioner also contends that he is actually innocent. (ECF No. 8 at 4). “[A]ctual
 15 innocence, if proved, serves as a gateway through which a petitioner may pass whether the
 16 impediment is a procedural bar . . . or . . . expiration of the statute of limitations.” McQuiggin v.
 17 Perkins, 569 U.S. 383, 386 (2013). However, the actual innocence gateway does not abrogate 28
 18 U.S.C. § 2244(b)(2)(B), the provision governing successive petitions. Gage v. Chappell, 793
 19 F.3d 1159, 1168–69 (9th Cir. 2015). Even assuming that a freestanding actual innocence claim is
 20 cognizable,² Petitioner “does not meet the threshold requirement . . . that, *in light of the new*
 21 *evidence*, no juror acting reasonably, would have voted to find him guilty beyond a reasonable
 22 doubt.” Schlup v. Delo, 513 U.S. 298, 329 (1995) (emphasis added); see Jones v. Taylor, 763
 23 F.3d 1242, 1247 (9th Cir. 2014) (“While we have not articulated the precise showing required,
 24 we have discussed the standard for a freestanding actual innocence claim by reference to the
 25 *Schlup* ‘gateway’ showing[.]”). Petitioner’s claim of actual innocence appears to be based on
 26 transcripts from his 2007 criminal trial and various pretrial proceedings. However, such evidence

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 28 ² “We have not resolved whether a freestanding actual innocence claim is cognizable in a federal habeas corpus proceeding in the non-capital context, although we have assumed that such a claim is viable.” Jones v. Taylor, 763 F.3d 1242, 1246 (9th Cir. 2014).

1 is not new given that it consists of portions of the existing state court record that Petitioner has
2 had access to for several years.

3 A state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a
4 district court's denial of his petition, and an appeal is only allowed in certain circumstances.
5 Miller-El v. Cockrell, 537 U.S. 322, 335–36 (2003). The controlling statute in determining
6 whether to issue a certificate of appealability is 28 U.S.C. § 2253, which provides as follows:

7 (a) In a habeas corpus proceeding or a proceeding under section
8 2255 before a district judge, the final order shall be subject to
review, on appeal, by the court of appeals for the circuit in which
the proceeding is held.

9 (b) There shall be no right of appeal from a final order in a
10 proceeding to test the validity of a warrant to remove to another
11 district or place for commitment or trial a person charged with a
12 criminal offense against the United States, or to test the validity of
such person's detention pending removal proceedings.

13 (c) (1) Unless a circuit justice or judge issues a certificate of
14 appealability, an appeal may not be taken to the court of
appeals from—

15 (A) the final order in a habeas corpus proceeding in which
16 the detention complained of arises out of process issued by
a State court; or

17 (B) the final order in a proceeding under section 2255.

18 (2) A certificate of appealability may issue under paragraph (1)
19 only if the applicant has made a substantial showing of the
denial of a constitutional right.

20 (3) The certificate of appealability under paragraph (1) shall
21 indicate which specific issue or issues satisfy the showing
required by paragraph (2).

22 28 U.S.C. § 2253.

23 If a court denies habeas relief on procedural grounds without reaching the underlying
24 constitutional claims, the court should issue a certificate of appealability “if jurists of reason
25 would find it debatable whether the petition states a valid claim of the denial of a constitutional
26 right and that jurists of reason would find it debatable whether the district court was correct in its
27 procedural ruling.” Slack v. McDaniel, 529 U.S. 473, 484 (2000). “Where a plain procedural bar
28 is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist

1 could not conclude either that the district court erred in dismissing the petition or that the
2 petitioner should be allowed to proceed further.” Id.

3 In the present case, reasonable jurists would not find the Court’s determination that
4 Petitioner’s habeas petition should be dismissed debatable or wrong, or that Petitioner should be
5 allowed to proceed further. Therefore, the Court declines to issue a certificate of appealability.

6 Accordingly, IT IS HEREBY ORDERED that:

- 7 1. The Findings and Recommendation issued on April 1, 2020 (ECF No. 6) is
8 ADOPTED IN FULL;
- 9 2. The petition for writ of habeas corpus is DISMISSED;
- 10 3. The Clerk of Court is DIRECTED to CLOSE the case; and
- 11 4. The Court DECLINES to issue a certificate of appealability.

12 IT IS SO ORDERED.

13 Dated: December 4, 2020



14 SENIOR DISTRICT JUDGE

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